



GERALD W. CONNOLLY
Judge

State of New York
Supreme Court Chambers
Albany County Courthouse
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Albany, NY 12207
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COPY

June 22, 2015

TARA A. KERSEY, ESQ.
Law Clerk
PATRICIA WATERBURY
Secretary

David R. Homer, Esq.
Carter, Conboy, Case, Blackmore,
Maloney & Laird, P.C.
20 Corporate Woods Boulevard
Albany, New York 12211

Re: Maureen Koetz v. NYS Joint Commission on Public Ethics
Index No.: 456-15

Dear Counselor:

Enclosed is the executed Decision and Order with regard to the above matter. The original is being forwarded to you for filing and service. A copy of the decision and order and the original supporting papers have been sent to the County Clerk for placement in the file.

Very truly yours,

Patricia Waterbury
Secretary to Judge

Enclosure

cc: William V. DeCandido, P.C.
71-50 Austin Street, Suite 208
Forest Hills, New York 11375

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

COPY

In the Matter of the Application of MAUREEN KOETZ,
Petitioner,

DECISION AND ORDER
Index No. 456-15
RJI No. 01-15-ST6455

For a Judgment Under Article 78 of the CPLR

-against-

NEW YORK STATE JOINT COMMISSION ON
PUBLIC ETHICS,

Respondent.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: William V. DeCandido, P.C.
Attorney for Petitioner
71-50 Austin Street, Suite 208
Forest Hills, NY 11375

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C.
David R. Homer, Esq.
Attorney for Respondent
20 Corporate Woods Blvd.
Albany, NY 12211-2362

Connolly, J.:

Petitioner is seeking an order granting the following relief in the context of the instant article 78 proceeding: “(a) a declaratory judgment and summary judgment determining New York State Assemblyman Sheldon Silver (“Assemblyman Silver”) has violated and is violating Public Officers Law §74 with respect to his receiving funds from Weitz & Luxenberg and Counsel Financial as alleged in the complaint of Maureen Koetz, dated September 17, 2014, to the New Your [sic] State Joint Commission on Public Ethics (“JCOPE”), and as a result, should be disqualified from serving as Speaker of the New York State Assembly (“Koetz Complaint”), (b) an order directing that JCOPE determine that Assemblyman Silver has violated and is

violating Public Officers Law §74 with respect to his receiving funds from Weitz & Luxenberg and Counsel Financial as alleged in the Koetz Complaint to JCOPE, and as a result, should be disqualified from serving as Speaker of the New York State Assembly, (c) an order directing JCOPE to perform a full investigation into alleged misconduct by Assemblyman Silver and other elected officials relating to the allegations as set forth in paragraphs 3 through 5 of the Koetz Complaint (which do not involve Assemblyman's Silver's receipt of funds from Weitz & Luxenberg and Counsel Financial), and (d) an order formally notifying the Petitioner of the decision on the vote, investigation, and actions of JCOPE relating to claims set forth in paragraphs 3 through 5 of the Koetz Complaint. Respondent opposes the petition and has moved to dismiss on the basis that the Court lacks subject matter jurisdiction and that the petition fails to state a cause of action.

While respondent asserts that the Court lacks subject matter jurisdiction over this Article 78 proceeding, it has failed to provide any legal authority, or legal argument, with respect to such claim. Accordingly, that grounds for dismissal is without merit. To the extent respondent argues that the petition fails to state a cause of action as a matter of law, the Court will address such ground for dismissal.

As argued by respondent, petitioner's request for (i) an order of the Court declaring and adjudging that Assemblyman Silver has violated the law and should be disqualified from serving as Speaker of the New York State Assembly and (ii) an order directing JCOPE to determine the same, must be denied as moot as Mr. Silver is no longer the Speaker of the Assembly, and accordingly, petitioner's requested relief is no longer available.

As to petitioner's requested relief seeking an order to compel JCOPE to perform an

investigation of Assemblyman Silver and other elected officials (and dictate the results of such investigation), such requested relief must be dismissed.

Mandamus to compel is appropriate only where the right to relief is clear and the action sought to be compelled is an act commanded to be performed by law involving no exercise of discretion. (*Matter of Korn v. Gulotta*, 72 NY2d 363 [1988]). “A discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result” (*New York Civil Liberties Union v. State of New York, et al.*, 4 NY3d 175, 184 [2005] [internal citations and quotations omitted]). “Traditionally, mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought. The long-established law is that while a mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion” (*Klostermann v. Cuomo*, 61 N.Y.2d 525, 539 [1984][internal citations and quotations omitted]).

As argued by respondent, mandamus to compel does not lie to direct JCOPE to perform a full investigation into alleged misconduct (*see*, Executive Law §94), or with respect to compelling a specific result from JCOPE upon such investigation (*see Mullen v Axelrod*, 74 NY2d 580 [1989]; *Davis v NYS Dep’t of Education*, 96 AD3d 1261 [3d Dept 2012]). The provisions of Executive Law §94 specifically provide that if the commission receives a sworn complaint alleging a violation of, *inter alia*, Public Officers Law §74, it shall, within forty-five calendar days of the date the complaint is received, vote on whether to commence a full investigation of the matter to determine whether a substantial basis exists to conclude that a violation of law has occurred. From the language of the statute, respondent has discretion concerning whether to commence an investigation and petitioner has not alleged that she is

seeking to compel respondent to vote on whether to commence a full investigation, but, rather seeks an order of the Court compelling respondent to investigate and compelling a specific result (*c.f. Trump v New York State Joint Commission on Public Ethics*, Index No. 4134-14 [Alb. Sup. Ct., February 11, 2015] [Respondent’s Exh. 1 to Motion to Dismiss]). Such relief cannot be granted.

Finally, as to petitioner’s application for an order compelling formal notification to petitioner of the decision on the vote, investigation and, actions of JCOPE relating to claims set forth in paragraphs 3 through 5 of petitioner’s complaint, Executive Law §94(13), provides, in pertinent part, that respondent shall vote on “... whether to commence a full investigation of the matter under consideration to determine whether a substantial basis exists to conclude that a violation of law has occurred”. While it seems reasonable that respondent provide a complainant of a simple “yes” or “no” as to whether an investigation will be conducted, there is no statutory authority compelling such notification, and, accordingly, petitioner is not entitled to the same.

As to the remainder of petitioner’s request for formal notification as to the investigation and actions of JCOPE relating to her claims, as the Court is not compelling an investigation or any actions by respondent relating to petitioner’s complaint, petitioner is not entitled to such mandamus relief. Executive Law §94(13)(b) provides, under the heading, “Substantial basis investigation”, that where the respondent determines “at any stage” that there is no violation or that a potential conflict of interest violation has been rectified, a complainant will be notified and “[a]ll of the foregoing proceedings shall be confidential”; however, such provision is effective where an affirmative vote to investigate has occurred. Further, as the investigation is statutorily required to be confidential, petitioner is not entitled to notification concerning the investigation or respondent’s “actions” concerning the claims she has raised in her complaint (which alleges relationships between Mr. Silver and other individuals and entities).

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

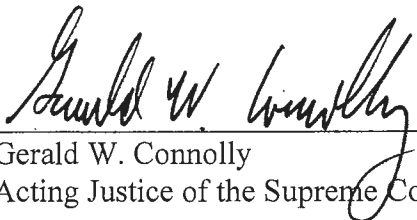
Accordingly, it is hereby

ORDERED that the petition is dismissed and the relief requested therein is in all respects denied.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the respondent's counsel. A copy of this Decision and Order together with all other papers are being forwarded to the County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED
ENTER.

Dated: June 22, 2015
Albany, New York


Gerald W. Connolly
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Petition dated January 28, 2015; Petition dated January 25, 2015; accompanying exhibits A-D;
2. Notice of Motion dated March 25, 2015; Attorney Affirmation of M. Stamm, Esq. dated March 24, 2015; exhibits A-B; Respondent's Memorandum of Law in Opposition to Article 78 Petition and in Support of Motion to Dismiss;
3. Affirmation in Support of Article 78 Petition and in Opposition to Respondents Motion to Dismiss dated April 17, 2015; Memorandum of Law;
4. Respondent's Reply Memorandum of Law in Opposition to Article 78 Petition and in Support of Motion to Dismiss dated May 1, 2015.